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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

'13CV0445 JM RBB

IN RE AFTERMARKET
AUTOMOTIVE LIGHTING
PRODUCTS ANTITRUST
LITIGATION

PENDING BEFORE THE
CENTRAL DISTRICT OF
CALIFORNIA

Case No. CV 09-ML-2007 GW
(PJWx) (C.D. Cal.)

S.D. Cal Case No: _____

**EAGLE EYES AND E-LITE'S
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF THEIR MOTION
TO COMPEL MITCHELL TO
PRODUCE DATA
RESPONSIVE TO A RULE 45
SUBPOENA *DUCES TECUM***

Judge: TBD
Hearing Date: TBD
Discovery Cut-Off: March 27,
2013
Pre-Trial Conference: September 5,
2013
Trial Date: September 17, 2013

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Pursuant to Rules 37(a) and 45 of the Federal Rules of Civil Procedure and Local Rule 26.1, Eagle Eyes Traffic Industrial Co., Ltd. and E-Lite Automotive Inc. (“Eagle Eyes”), Defendants in *In re Aftermarket Automotive Lighting Products Antitrust Litigation*, 09-ml-2007 GW (PJWx), pending in the Central District of California (“Central District Action”), hereby move Mitchell International, Inc. (“Mitchell”),¹ to produce information responsive to the Rule 45 Subpoena *Duces Tecum* served on it on September 4, 2012.

I. INTRODUCTION

Eagle Eyes served Mitchell, a company that provides information to the automotive repair and casualty claims industry, with a Subpoena on September 4, 2012, seeking pricing information of auto lights in connection with an antitrust action in the Central District of California alleging Eagle Eyes and its co-Defendants fixed the prices of aftermarket taillights in the United States. The plaintiffs allege in that action that Defendants’ alleged price-fixing caused them to pay more for auto lights than they should have. As such, to the extent that market data shows that Defendants’ customer did not pay more than they would have had they purchased products from others, the electronically stored pricing data² which is only available from Mitchell, is relevant to issues in dispute. Moreover, Mitchell, as the owner of the pricing data and the developer of the proprietary software that houses such data, is the party best equipped to produce this data.

More than five months later, and despite not having objected to the Subpoena

¹ This Court has jurisdiction over this dispute as the Subpoena was issued from the Southern District of California and Mitchell resides within, as was served with the Subpoena in, this District. *See Patrick Collins, Inc. v. Does*, 2012 U.S. Dist. LEXIS 40207, *3 (S.D. Cal. Mar. 23, 2012).

² The Subpoena specifically called for the production of Electronically Stored Information such as databases, electronic data compilations and spreadsheets as pricing information in this format can be easily manipulated or analyzed by computer programs. Pricing information in, for example, a .pdf file cannot be manipulated; someone must actively re-type that data into a spreadsheet or database before it can be used (as the OCRing process is not reliable or accurate for numbers), and where a spreadsheet can exceed several thousand pages, that is a daunting proposition. Declaration of Joanna Rosen (“Rosen Decl.”) at ¶ 28.

1 or moved this Court to quash/modify the subpoena, Mitchell still has not produced
2 *any* electronically stored pricing data. While Mitchell has generally said that it will
3 be expensive or difficult to retrieve the pricing data, it has never once said that it
4 does not have the requested data and it has never provided Eagle Eyes with an
5 estimate of how much it would cost to extract the data. Mitchell has the pricing
6 data, but does not want to have to do any work to produce it.

7 Further, Mitchell has responded with silence to Eagle Eyes' genuine
8 questions about Mitchell's data systems and sincere requests for updates on the
9 status of Mitchell's non-existent-production. With Mitchell not having produced
10 any electronic pricing data by mid-November, and clearly disinclined to do so,
11 Eagle Eyes agreed to have Mitchell send it an exemplar pricing data CD so that it
12 could examine its responsiveness; Eagle Eyes did not need to take on this burden
13 but chose to do so to demonstrate its good faith and to alleviate any outstanding
14 burden on Mitchell. But, when Eagle Eyes finally received this CD a month later,
15 the pricing data Mitchell promised did not appear to be on the CD and, even if it
16 were, Mitchell failed to provide Eagle Eyes with the necessary password to access
17 it. Since then, Eagle Eyes' requests for the password have been ignored.

18 It is clear now that Mitchell never intended to comply with the Subpoena.
19 For example, there is reason no why Mitchell would send Eagle Eyes a CD
20 requiring a password and then never provide it with those credentials unless it
21 wanted to frustrate Eagle Eyes' discovery efforts. The roadblocks, silence and
22 gamesmanship must come to an end. "Not wanting" to have to produce responsive
23 data is not an excuse for noncompliance with Rule 45. This Court should grant this
24 Motion to Compel and Order Mitchell to either: (1) export and produce in a non-
25 proprietary, usable format all of the pricing data for auto lights in the U.S. **OR** (2)
26 create and run all necessary queries to retrieve responsive data from its Estimate's
27 Database and produce that to Eagle Eyes for the period of January 1, 2001 and
28 December 31, 2010 (the "Pricing Data").

II. FACTUAL BACKGROUND

A. The Central District Action Alleging Price Fixing In The Aftermarket Auto light Industry

A class of direct purchaser plaintiffs allege in the Central District Action that Eagle Eyes and its co-Defendants (manufacturers of aftermarket autolights and their distributors) conspired with one another between July 2001 and February 2009 (the “Class Period”) to fix the prices of aftermarket autolights in the United States in violation of the Sherman Act. *See* First Amended Consolidated Class Action Complaint in the Central District Action, Docket No. 158. Discovery in the Central District Action will close on March 27, 2013. Declaration of Joanna Rosen (“Rosen Decl.”) at ¶ 2. Defendants’ expert report is due on April 30, 2013. *Id.*

B. Mitchell International, Inc.

Mitchell claims to process “over 50 million transactions annually for over 300 insurance companies/claims payers and over 30,000 auto collision repair shops.” *Id.* at Ex. A.1. Mitchell has developed and uses “leading-edge technology, extensive information resources and personal service with broad claims management expertise,” *id.*, to track, *inter alia*, the price of automotive parts, including aftermarket autolights, so that insurance agents, auto body shops, and adjusters can “price out” a repair. *See also id.* (“Mitchell . . . developed the industry’s first accurate, functioning car parts replacement information source for collision-damaged vehicles.”).

One of Mitchell’s “products” is the Collision Estimator’s Guide, better known as the “Mitchell Book.” The Mitchell Book lists all the prices of original equipment manufactured parts by make, model and year. *See id.* at ¶¶ 14, 23, Ex. H, J.

Mitchell also maintains a database called “MAPPs,” which contains real-time pricing information. *See id.* at ¶ 11. As MAPPs is “dynamic,” the database does not store historical pricing; only by backing up Mitchell’s system-wide tapes and

1 restoring the MAPPs database could you access MAPPs' historical pricing. *Id.*
 2 Historical data from the MAPPs database is not the subject of this Motion as
 3 Mitchell has not kept back-up tapes for the Class Period. *See id.*

4 Mitchell has, however, developed proprietary software, called "Ultramate,"
 5 which also provides pricing information. Ultramate is an online program but can
 6 also be downloaded by CD. Mitchell periodically sends it customers without online
 7 access "Ultramate CDs," which contains the most current pricing information/
 8 update. *Id.* at ¶ 21. These CD are encrypted such that any data on a CD older than
 9 90 days cannot be accessed (as such pricing data is outdated). *See id.*

10 Another Mitchell database, called the "Estimates Database," stores the
 11 invoices of/claims for repairs. *Id.* at ¶ 12. Thus, whereas the Mitchell Book and
 12 Ultramate provides manufacturer's sales price, the Estimates Database would tell
 13 one how much was actually paid for a repair. *See id.* Mitchell actively stores data
 14 from the Estimates Database dating back to 2002. *See id.* at Ex. L.

15 **C. The Subpoena And Mitchell's Failure To Object Or Respond**

16 On September 4, 2013, Eagle Eyes served Mitchell with a Subpoena *Duces*
 17 *Tecum* compelling production by September 21, 2012, of just three categories of
 18 documents and information, including:

19 All databases, including spreadsheets, electronic data compilations and
 20 other Documents sufficient to show the pricing of all [Original
 Equipment Manufactured and Salvaged]³ Auto Light parts, including but not

21 ³ The Subpoena defines Original Equipment Manufactured Auto Light parts as:
 22 "any original equipment manufacturer produced light products, including but not
 23 limited to, headlamps, driving lamps, fog lamps, cornering lamps, spot lights, off-
 24 road lamps, signal lights, identification lights, front position lamps, parking lamps,
 daytime running lamps, sidemarker lights, turn signals, rear position laps, brake
 signals, hazard flashers, rear license plate lamps, reflectors, internal vehicle
 lighting, ornamental lights, and emergency vehicle lights." Rosen Decl. at Ex. B.

25 The Subpoena defines "Salvage Auto Lights" as any "any salvage, used, repaired
 26 and/or reconditioned original equipment manufacturer produced automotive
 27 lighting product, including, but not limited to, including but not limited to,
 28 headlamps, driving lamps, fog lamps, cornering lamps, spot lights, off-road lamps,
 signal lights, identification lights, front position lamps, parking lamps, daytime
 running lamps, sidemarker lights, turn signals, rear position laps, brake signals,
 hazard flashers, rear license plate lamps, reflectors, internal vehicle lighting,

limited to [Original Equipment Manufactured and Salvaged] Auto Light parts organized by Partslink number,⁴ during the Relevant Time Period.⁵

Id. at Ex. B, ¶ 6. The Subpoena sought only the underlying pricing data. *Id.* at ¶ 7.⁶

Mitchell did not serve objections to the Subpoena by September 18, 2012, as required by Rule 45 of the Federal Rules of Civil Procedure. *See id.* at ¶ 8; Fed. R. Civ. P. 45(c)(2)(B). As such, on September 20, 2012, Joanna Rosen, counsel for Eagle Eyes, contacted Mitchell. Rosen Decl. at ¶ 8. Jason Grey, in house counsel for Mitchell, advised Ms. Rosen that Mitchell would *not* be producing documents by the September 21, 2012 deadline, and directed her to speak further with Mitchell's outside counsel, Scott Schutte. *Id.*⁷

D. The Initial Discussions Regarding The Subpoena

On October 3, 2012, conversation, Mr. Schutte generally explained the MAPPs database and Estimates Database to Ms. Rosen. *See Id.* at Exs. B, C. Because the parties did not learn until later that Mitchell's back-up tapes only "go-back" one year, Mr. Schutte advised Mr. Rosen that the only way to retrieve MAPPs historical pricing data would be to restore the system-wide back-up tapes. *See id.* at ¶ 11. In regard to the Estimates Database, Mr. Schutte stated that he

ornamental lights, and emergency vehicle lights." *See id.*

⁴ "Partslink" number refers to an industry convention for the numbering of an identification of auto parts. Rosen Decl. at ¶ 13.

⁵ The Relevant Time Period was defined in the subpoena as: January 1, 2000 through September 4, 2012. Rosen Decl. at Ex. B. For this, and to alleviate any burden on Mitchell, if any, Eagle Eyes seeks responsive data for the period of January 1, 2001 and December 31, 2010.

⁶ The third request sought documents pertaining to Mitchell's document retention and document destruction policies. Mitchell has produced one document that is responsive to this request. *See* Rosen Decl. at Ex. L. Mitchell also produced the pre-2006 industry reports and analyses it published, most of which "were (and some still are) publicly available" online. *See id.* at Ex. I.

⁷ Eagle Eyes also served Mitchell with a Subpoena To Testify At A Deposition In A Civil Action on September 28, 2012. Rosen Decl. at Ex. B. Mr. Grey informed Ms. Rosen that Mitchell would also *not* be appearing for a deposition on September 28, 2012. *Id.* at ¶ 8. As Mitchell has not yet produced pricing data responsive to the Subpoena, Eagle Eyes has not been able to take its deposition. Eagle Eyes preserves all its rights to serve Mitchell with a deposition subpoena.

1 believed “queries” could be written to search specific parts/data, but that the writing
2 and running of such queries would be expensive and laborious. *See id.* at ¶ 12.

3 Ms. Rosen had several follow-up questions, including “What would be the
4 general cost or rate per query [of the Estimate’s Database]? . . . would a separate
5 query have to be run for each [part number]?”, how far back in time back-up tapes
6 are kept, and whether hard copies/electronic copies of the “Mitchell Book” were
7 available and could be produced. *See id.* Ex. D, ¶¶ 13, 14. Mr. Schutte stated he
8 would consult with his client and follow up with Ms. Rosen. *See id.* at ¶ 13, Ex. D.

9 **E. Mitchell Avoids Production Of Its Own ESI And Has Shifted The**
10 **Burden To Eagle Eyes To Examine And Extract Pricing Data**

11 Mitchell never responded to Eagle Eyes’ questions regarding date-range of
12 and costs to access the data on MAPPS and Estimates Database, instead diverting
13 the parties to a entirely different source of data which they still have yet to produce.

14 After several days passed without any response from Mitchell, Ms. Rosen
15 sent Mr. Schutte an email on October 12, 2012, asking whether he “had heard back
16 from [his] client.” *Id.* at Ex. E, ¶ 16. Receiving no response, Ms. Rosen emailed
17 Mr. Schutte four days later on October 16, 2012, to “check in with [him] on the
18 Mitchell [S]ubpoena.” *Id.* at Ex. E, ¶ 17. Six more days elapsed without a
19 response. *See id.* at ¶ 18. On October 22, 2012, Ms. Rosen called Mr. Schutte to
20 ask for an update. *See id.* at ¶ 18, Ex. F. Three more days passed with no word. *Id.*
21 at ¶ 19. Finally, Ms. Rosen sent Mr. Schutte a letter cataloguing her attempts to
22 reach him and asking him to respond to her no later than October 26, 2012; he did
23 not respond by October 26, 2012, as requested. *See id.* at ¶¶ 19, 20 Ex. F.

24 Finally, on November 1, 2012, Mr. Schutte contacted Ms. Rosen. *Id.* at Ex.
25 G. The focus of this conversation shifted from the MAPPs and Estimate’s
26 databases to the “Ultramate” software. *See id.* at ¶ 21.⁸ Mr. Schutte first explained

27 ⁸ On November 5, 2012, Mr. Schutte confirmed via email that Mitchell has the
28 Mitchell Books going back to 2001. *See* Rosen Decl. at ¶ 23, Ex. H. Later that
day, Ms. Rosen replied that “[W]e would definitely like the [Mitchell Books] back
to 2001.” *Id.* at ¶ 22, Ex. H. The next day, Mr. Schutte mentioned for the first time

1 how Mitchell's library of Ultramate CDs containing pricing information spanning
 2 the Class Period might be an alternative to restoring the MAPPs database or writing
 3 queries for the Estimate's Database. *See id.* Although the Ultramate CD's
 4 encryption would prevent a user from being able to load and access CDs older than
 5 90 days, he suggested that a "work around" of the encryption could perhaps be
 6 devised. *See id.* ¶ 21.

7 During a subsequent call with Mitchell's IT personnel on November 12,
 8 2012, to discuss a "work-around" the encryption, Mitchell explained that it has a
 9 debugger to defeat the CD's encryption. *Id.* at ¶¶ 22, 33, 35. Mitchell's debugger
 10 is product specific as opposed to application specific; it could thus decrypt pricing
 11 data for specific products for the relevant time period. *See id.* As Mitchell IT
 12 personnel said that it would be difficult, although possible, to decrypt this data, the
 13 parties discussed whether Mitchell could send Eagle Eyes an "exemplar" CD to
 14 give IT personnel at Eagle Eyes' Counsel's law firm, Manatt, Phelps & Phillips
 15 ("Manatt") an opportunity to develop a "work around" the encryption. *Id.* at ¶ 36.

16 that Mitchell published the Mitchell Books quarterly and that each edition of the
 17 older versions "totals about 4,000 pages," and "[t]o make things more difficult, the
 18 [Mitchell Books] are printed on really thin paper, which make it difficult to
 19 copy/scan." *Id.* (emphasis added) Rather than wait to hear back from Ms. Rosen as
 20 to how Eagle Eyes wished to proceed in light of this newfound information about
 21 how "difficult" it would be to copy these Books, Mr. Schutte emailed Ms. Rosen on
 22 November 8, 2012, stating that "there are about 50 boxes of [Mitchell Books],
 23 estimated to be about 1,500-2,000 pounds. How do you want to handle." *Id.* at Ex.
 24 J. That same day, Ms. Rosen sent Mr. Schutte two emails asking questions about
 25 the format and organization of the Mitchell Book. *Id.* On November 9, 2012, Ms.
 26 Rosen emailed Mr. Schutte to advise him that "I should know on Monday what we
 27 want to do with [the Mitchell Books; whether we will send a vendor in to copy
 28 them or not]." *Id.* at Ex. J. On Tuesday, November 13, 2012, Ms. Rosen followed
 up with Mr. Schutte and advised him that the cost of xeroxing 2,000 pounds of data
 that would likely not copy well, and the inability of the Eagle Eyes' experts to
 manipulate data that is on .pdf files as opposed to ESI, *see infra*, rendered copying
 of the Mitchell Books not feasible. *See id.* at Ex. L, ¶ 38(a).

Any argument that Mitchell spent thousands of dollars to compile these books, *see*
id. at Ex. Q, is a red herring. The period between when Mr. Schutte first told Ms.
 Rosen that these books may be "difficult" to copy and when she advised him that
 Eagle Eyes was not sure whether it would proceed with copying them was
 approximately 48 hours. *See id.* at Exs. H, J, L. To suggest that Mitchell incurred
 significant time, delay or expense in collecting its own bound books and storing
 them for a handful of days is a non-starter.

1 Eagle Eyes also asked Mitchell to provide it with “a copy of the underlying table(s)
 2 that contain the pricing information” that is on the Ultramate CD in a usable format
 3 (i.e., text file, Microsoft SQL, Microsoft Access). Declaration of James Rosenthal
 4 (“Rosenthal Decl.”) at ¶ 10; Rosen Decl. at ¶ 37. The Mitchell personnel indicated
 5 that they would do so. *See id.* at ¶ 37; Rosenthal Decl. at ¶ 10.

6 On November 13, 2012, Ms. Rosen sent Mr. Schutte an email asking for a
 7 sample Ultramate CD, and stating that in “choosing to pursue the Ultramate
 8 option” Eagle Eyes specifically reserved any and all rights to seek production of
 9 data from the Estimate’s database at a later time “should we be unable to access the
 10 data from and through the Ultramate CD. At this juncture . . . we think that it is the
 11 best use of resources and imposes the least burden on your client to pursue that
 12 Ultramate option as that may prove to be the easiest and most cost effective way to
 13 obtain responsive information.” *Id.* at Ex. L, ¶¶ 38(b), 38(c). Thus, Eagle Eyes
 14 assumed the burden of examining the Ultramate CD and trying to access and
 15 download Mitchell’s own ESI in order to minimize any burden and expense on
 16 Mitchell. *See id.* at Ex. L, ¶ 38.

17 **F. Mitchell’s Continued Non-Compliance And Non-Responsiveness**

18 Two weeks passed with no word from Mitchell. *See id.* at Ex. L, ¶ 40. On
 19 November 28, 2012, Ms. Rosen emailed Mr. Schutte to check in on the status of the
 20 Ultramate CD. *See id.* Nearly a week passed with no response. *See id.* at Ex. L, ¶
 21 41. On December 3, 2012, Ms. Rosen called Mr. Schutte and left him a voicemail,
 22 inquiring about the Ultramate CD. *See id.* Two days later, still having not received
 23 any response to either her voicemail message or emails, Ms. Rosen again emailed
 24 Mr. Schutte, stating “I have not received a response [from you] regarding the
 25 Ultramate CD. Please contact me to discuss your client’s position on this and its
 26 remaining obligations under the subpoena.” *Id.* at Ex. L, ¶ 42.

27 Finally, on December 6, 2012, Mr. Schutte responded, indicating that
 28 Mitchell would send Eagle Eyes the exemplar CD. *See id.* at Ex. L. Eagle Eyes

1 finally received the sample Ultramate CD on December 14, 2012. *See id.* at ¶ 45.

2 Manatt's IT personnel spent a significant amount of time attempting to load,
3 use and analyze the exemplar CD but were quickly frustrated in their attempts as
4 the CD provided appeared to be "just an install disk," and did not have the pricing
5 tables that were promised. *See* Rosenthal Decl. at ¶¶ 12, 13, 17; Rosen Decl. at Ex.
6 L, ¶ 47. "Although [Manatt was] able to install the program, [it] could not proceed
7 any further or search for parts to see pricing information without an Organization
8 ID, User ID and Password." *Id.* at Ex. L, ¶ 47.

9 Because Manatt "could not use the CD or access the pricing" information
10 purportedly on this CD, including the underlying pricing tables Mitchell's staff had
11 said they would send to Eagle Eyes, Ms. Rosen contacted Mr. Schutte on December
12 20, 2012, to advise him that the CD was password protected and asking for either
13 an "Organization ID, User ID and Password to access [the pricing] data," or "the
14 tables, databases or spreadsheets of the parts pricing for a sample month" (in case
15 Mitchell did not want to issue a password for its proprietary software). *Id.* Ms.
16 Rosen also included "screen shots of the dialogue boxes [Manatt IT personnel
17 were] encountering when using the CD that [were] prevent[ing] them from going
18 further." *Id.*

19 Two weeks passed with no response. *Id.* at ¶ 48. On January 3, 2013, Ms.
20 Rosen contacted Mr. Schutte for an update. *Id.* at Ex. L. Four days later, Mr.
21 Schutte replied saying that "It sounds like [Mitchell] may have sent the wrong disk"
22 and indicating that he would follow up with his client. *Id.*

23 Yet another week passed with no word from Mr. Schutte. *Id.* at ¶ 49. On
24 January 14, 2013, Ms. Rosen emailed Mr. Schutte, asking to "[p]lease advise if you
25 found out from Mitchell the status with the CDs." *Id.* at Ex. M.

26 Eight more days of silence ensued. *Id.* at ¶ 50. On January 22, 2013, over a
27 month after first alerting Mitchell to the problems encountered with the CD, Ms.
28 Rosen emailed Mr. Schutte again asking for login credentials for the Ultramate CD,

1 stating that “[t]his is now the fourth time I am asking for this information . . . we
 2 have had what appears to be the wrong CD for over a month, we have been unable
 3 to move forward with analyzing any of the data and/or determining whether
 4 Mitchell has provided us with the information required by the Subpoena.” *Id.* at ¶
 5 50, Ex. M; *see also* Exs. N, O.

6 Although Mr. Schutte responded to Ms. Rosen’s January 22, 2013 email by
 7 stating that “[t]he client told me that what you were sent included the data,” he has
 8 never provided her with a login/password to access any data on the CD. *See id.*; *see*
 9 *also* at ¶ 59. He also ignored Ms. Rosen’s subsequent emails offering to have the
 10 parties’ IT personnel speak again, providing more information on the problems
 11 Manatt was encountering with the CD, and asking if Mitchell could export and send
 12 her the pricing data to a usable, non-proprietary format. *See id.* at Exs. N, O, ¶ 52.

13 On January 28, 2013, for the fifth time, Ms. Rosen emailed Mr. Schutte
 14 asking him about the status of the Ultramate CD. *Id.* at ¶ 52(c), Ex. O. Mr.
 15 Schutte, as had become his practice, never responded. *Id.* at ¶ 52.

16 Eagle Eyes was finally forced on February 6, 2013, to send Mitchell a meet
 17 and confer letter indicating its intention to move to compel Mitchell’s compliance
 18 with the Subpoena. *See id.* at Ex. P. In that letter, Eagle Eyes asked, yet again, for
 19 the login credentials or for Mitchell to export the pricing data to a usable file
 20 format. *Id.* During the course of the parties’ subsequent telephonic meet and
 21 confer on February 20, 2013, Mr. Schutte tacitly acknowledged that: (1) he had not
 22 sent Ms. Rosen the necessary login credentials; and (2) Mitchell can decrypt the
 23 data on the Ultramate CD but is generally disinclined to have to do any work to do
 24 so.⁹ *Id.* at ¶¶ 59-62.

25 ⁹ In his response to Eagle Eyes’ meet and confer letter in connection with this
 26 Motion, Mr. Schutte offered to send a “replacement CD” to Eagle Eyes. *See* Rosen
 27 Decl. at Ex. Q. Given the problems Manatt had encountered with the first CD, and
 28 no acknowledgment of the status of producing the underlying pricing tables
 separate from the Ultramate CD, Mr. Schutte’s utter non-responsiveness as to the
 first CD and clear unwillingness to provide Eagle Eyes with even login
 information, as well as the upcoming Discovery Cut-Off in the Central District

1 In yet another effort at striking a compromise, Ms. Rosen asked Mr. Schutte
 2 during their telephonic meet and confer to provide her with an estimate of how
 3 much it would cost Mitchell to debug the Ultramate CDs and produce historic
 4 pricing information so that Eagle Eyes could better assess any possible burden on
 5 Mitchell. *See id.* at Ex. R, ¶¶ 61-68. Although Mr. Schutte promised to provide
 6 Ms. Rosen with this estimate, he has not done so. *See id.*

7 To-date, Mitchell has not responded to Eagle Eyes' questions about the
 8 Ultramate CD or otherwise provided it with the necessary credentials to access the
 9 pricing data purportedly on the CD, or otherwise responded to Eagle Eyes' request
 10 to export the pricing data into a usable, readable format, or even quantify the
 11 burden (if any) producing responsive pricing data would impose on Mitchell.
 12 Moreover, to-date, Mitchell has only produced: (1) its industry reports, which as
 13 explained, are/were publicly available; and (2) one document relevant to its
 14 document deletion policy. *Supra* FN 6, Rosen Decl. at ¶ 59. Mitchell has not
 15 produced any pricing data in a usable format *see infra* FN 1, as required by the
 16 Subpoena.

17 **III. MITCHELL WAIVED ANY AND ALL OBJECTIONS TO THE** 18 **SUBPOENA**

19 Rule 45 of the Federal Rules of Civil Procedure expressly authorizes the
 20 issuance of subpoena commanding a non-party to produce designated records or
 21 things. Fed. R. Civ. P. 45(a)(1)(C).

22 A party served with a Rule 45 subpoena must either: (1) refuse to comply
 23 and challenge the subpoena if cited for contempt, *United States v. Ryan*, 402 U.S.
 24 530, 532 (1971); (2) move to quash or modify the subpoena or otherwise move for
 25 a protective order, *see gen.* Fed. R. Civ. P. 45(c)(3)(A); (3) serve the subpoenaing
 26 attorney with "a written objection to inspecting, copying, testing or sampling any or

27 Action, Eagle Eyes declined this request. *See id.* at Ex. Q, ¶ 60. Eagle Eyes' offer
 28 in November 2012 to assume the burden of analyzing and unlocking responsive
 pricing data from this CDs has now expired. *See id.*

1 all of the materials” within fourteen days after service of the subpoena, Fed. R. Civ.
 2 P. 45(c)(2)(B); or (4) produce responsive documents.

3 The failure to serve timely objections or seek court intervention *waives all*
 4 *grounds for objection to the subpoena*, including any contention that the subpoena
 5 is overbroad and/or unduly burdensome. *In re DG Acquisition Corp.*, 151 F.3d 75,
 6 81 (2d Cir. 1998); *see also Kandant Johnson, Inc. v. D’Amico*, 12-mc-00126, 2012
 7 U.S. Dist. LEXIS 63162 (D. Or. May 4, 2012) (“Had E.S. Constant [served
 8 objections], it would have not waived any Instead, however, [it] simply
 9 ignored its obligations under the subpoena and served no written objections at all
 10 until . . . after [this] motion to compel was filed.”); *Widevoice Communications v.*
 11 *Qwest Communications, Co.*, 12-cv-00467-GMN –VCF, 2012 U.S. Dist. LEXIS
 12 58248, *7-8 (D. Nev. Apr. 26, 2012) (granting motion to compel and finding that
 13 absence unusual circumstances, the third party waives untimely objections to a
 14 subpoena); *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 636 (C.D. Cal. 2006)
 15 (finding that a “nonparty’s failure to timely make objections to a Rule 45 subpoena
 16 . . . generally requires the court to find that any objections have been waived.”).

17 Mitchell did not serve objections to the Subpoena or seek this Court’s
 18 involvement. Rosen Decl. at ¶ 8. To the contrary, the deadline to serve objections
 19 came and went without word from Mitchell; it was only when *Eagle Eyes’ counsel*
 20 *reached out to Mitchell* on September 20, 2012, that Eagle Eyes learned that
 21 Mitchell would not be producing responsive documents on September 21, 2012, as
 22 required by the Subpoena. *Id.* Moreover, the first time Mitchell even uttered the
 23 word “overly broad” and “unduly burdensome” was in its February 13, 2013
 24 response to Eagle Eyes’ meet and confer letter. *Id.* at Ex. Q.

25 Based on the authorities above, Mitchell waived any and all objections to the
 26 Subpoena. For this reason alone, the Court should **grant** the Motion and order
 27 Mitchell to produce the Pricing Data.

IV. THE COURT SHOULD COMPEL MITCHELL TO PRODUCE RESPONSIVE DATA AND INFORMATION AS MITCHELL HAS NOT COMPLIED IN GOOD FAITH AND THE TIME FOR PRODUCTION HAS LONG SINCE PASSED

The Federal Rules of Civil Procedure allow for broad discovery of any non-privileged matter relevant to a party's claims or defenses and the "scope of discovery through a subpoena is the same as that applicable to Federal Rule of Civil Procedure and other discovery rules." *LG Display Co. v. Chi Mei Optoelectronics Corp.*, 08cv2408-L (POR), 2009 U.S. Dist. LEXIS 6362, *4 (S.D. Cal. Jan. 28, 2009) (Porter, M.J.); Fed. R. Civ. P. 26(b)(1).

A non-party who receives a subpoena for data, including Electronically Stored Information ("ESI"), has the burden of proving the subpoena seeks irrelevant data, or is overly broad and/or unduly burdensome and/or that the data and ESI is not reasonably accessible. Fed. R. Civ. P. 45(a)(1)(C); *see also Berwick v. Hartford Fire Ins., Co.*, 12-00055-PHX-FJM, 2012 U.S. Dist. LEXIS 95622, *3-4 (D. Ariz., July 11, 2012) citing *Goodman v. United States*, 369 F.2d 166, 169 (9th Cir. 1966) ("The burden of showing that a subpoena is unreasonable and oppressive is upon the party to whom it is directed."); *Painters Joint Comm. v. Empl. Painters Trust Health & Welfare Fund*, 10-cv-01385-JCM-PAL, 2011 U.S. Dist. LEXIS 113278, 16-17 (D. Nev. Sept. 28, 2011) (opining that party served with a Rule 45 subpoena has the burden of showing with "specific[] detail" why it seeks irrelevant information or imposes an undue burden).

Even then, if the need for the information outweighs the burden and cost of production, the Court has the discretion to order the responding party to produce the requested data. *See* Fed. R. Civ. P. 45(a)(1)(C). In making such a decision, courts consider the relevance of the requested data, the requesting party's need for the data, the breadth of the request, the burden or expense on the person subject to the subpoena and whether responsive information is available elsewhere. *See LG Display Co.*, 2009 U.S. Dist. LEXIS 6362 at *4-9 (granting motion to compel in

part because relevance to issues in pending action outweighed any burden on responding party); *see also Realtime Data, LLC v. MetroPCS Tex., LLC*, 12cv1048-BTM (MDD), 2012 U.S. Dist. LEXIS 73257, *3 (S.D. Cal. May 25, 2012) (Dembin, M.J.) (granting motion to compel in part); *Berwick*, 2012 U.S. Dist. LEXIS 95622 at *4.

1. The Requested Data Is Relevant

The data requested from Mitchell—pricing data including the underlying sales price of autolights in the United States during the relevant time period—is relevant to the claims and defenses in the Central Action. The Mitchell data not only contains the prices at which Eagle Eyes and its co-Defendants’ sold aftermarket autolights in the United States, but the prices at which its competitors sold aftermarket autolights in the United States. This data is relevant to assessing the plaintiffs’ allegations that Defendants fixed the prices of aftermarket autolights and that they paid an overcharge as a result of the alleged conspiracy. Market data—including what other manufacturers were charging for products during the relevant time period—is needed to determine whether plaintiffs were charged more than they otherwise would have been in the absence of an alleged conspiracy. *See id.* (finding requested documents were relevant).

And while Eagle Eyes is sensitive to the fact that Mitchell is a non-party, the fact that Mitchell is the *only* source of this data militates in favor of production. *See id.* (noting that requested documents “are not available from other sources.”). Mitchell is the only organization of its kind in the United States that collects pricing data for the automotive industry. *See Rosen Decl.* at ¶ 5. It is not feasible to have Eagle Eyes serve subpoenas on all the manufacturers of autolights sold in the United States for their pricing data as there are literally dozens of such manufacturers, some of whom are beyond subpoena power because they sell to end users in the United States “FOB” from overseas.

Because the relevance of this Pricing Data to the issues in the Central District

1 Action coupled with the fact that the requested Pricing Data is available from any
 2 other source outweighs any undue burden Mitchell could claim the Subpoena
 3 imposes, this Court should grant the Motion.

4 **2. The Burden On Mitchell Is Minimal And Its Delay Tactics**
 5 **Must Come To An End**

6 “There is no doubt that document production . . . [is] burdensome. Access to
 7 relevant documents is, however, necessary for the search for truth. The question
 8 under Federal Rule of Civil Procedure 45 . . . is whether the proposed production
 9 exposes [the responding party] to significant expense or undue burden.” *Wilbur v.*
 10 *City of Mount Vernon*, C11-1100RSL, 2012 U.S. Dist. LEXIS 91473, *9-10 (W.D.
 11 Wash. June 27, 2012) (finding the burden on the responding party was not
 12 excessive). Moreover, the responding party must do more than just generally state
 13 a request is unduly burdensome – it must *prove* it. *See Painters Joint Comm*, 2011
 14 U.S. Dist. LEXIS 113278 at *17 (denying motion to quash third party subpoena
 15 because party failed to prove the subpoena was unduly burdensome).

16 Here, Mitchell cannot meet its burden of proving that the Subpoena imposes
 17 an undue burden. *See id.* First, it is undisputed that Mitchell has the Pricing Data
 18 and that it has never once quantified the burden and costs it would incur to produce
 19 responsive data. *See Marti v. Baires*, 08-cv-00653-AWI-SKO PC, 2012 U.S. Dist.
 20 LEXIS 77962, *49-50 (E.D. Cal. June 5, 2012) (finding that non-party must
 21 produce the data it has unless it proves that it is not accessible). At most, Mitchell
 22 has said that production would be expensive and time consuming; it said producing
 23 historical pricing data would be expensive but never stated how much it would cost;
 24 it said it would be expensive to write queries for the Estimate’s database, but never
 25 said how much it would cost or how many man hours it would take; it said
 26 “debugging” Ultramate would be labor intensive but did not explain why or how.
 27 Mitchell has never provided Eagle Eyes with a cost-estimate or provided Eagle
 28 Eyes with data justifying its claims that production would be expensive and time-

1 consuming. *See* Rosen Decl. at ¶¶ 61-68, Exs. Q-R.

2 Second, by Mitchell's own concession it should be able to readily access
3 Pricing Data. The fact that Mitchell can "debug" Ultramate means that the pricing
4 data exists "live," and is not solely on a back-up tape. Rosenthal Decl. at ¶ 16.

5 Third, the process of extracting and piecing together Mitchell's own pricing
6 tables from its own software should not be unduly burdensome or cost prohibitive
7 according to industry practices and standards. *See id.* at ¶ 15. As a master copy of
8 pricing data is typically stored in a database format such as Microsoft SQL,
9 Microsoft Access, Raima Database Manager, or some similar database application,
10 and as all such database applications allow for the export of data, it would be
11 relatively simple for a database administrator to run a report which would be able to
12 list the part name, part number, description, date period, and pricing information.
13 *See id.* Alternatively, if the pricing data is stored in a database, it would be possible
14 to export the entire database to a standard delimited text file. *See id.* Or, if the
15 relevant data fields are stored across multiple tables, i.e. in relational databases,
16 Mitchell could run reports across these different related database and export the
17 result product to a standard delimited text file for Eagle Eyes to view. *See id.*

18 Fourth, although Eagle Eyes requests data spanning 9 years, this factor is
19 outweighed by the importance of the Pricing Data to the issues in dispute in the
20 Central District. *See LG Display Co.*, 2009 U.S. Dist. LEXIS 6362 at *4-9 (granting
21 motion to compel that requested data spanning eight years).

22 Finally, equity demands that Mitchell's own delay tactics and demonstrated
23 bad faith should prevent it arguing undue burden. Mitchell has done nothing but
24 seek to avoid or otherwise pass its production burden off to Eagle Eyes. All
25 Mitchell has done is to send Eagle Eyes a CD; but the sending of a CD—that
26 cannot even be accessed—does not comport with the spirit of the Federal Rules of
27 Civil Procedure or Mitchell's production obligations. *See gen.* Fed. R. Civ. P. 37
28 (requiring cooperation in discovery). Even though Mitchell is the party best

1 equipped to decrypt its own proprietary software, Eagle Eyes agreed to accept a
 2 sample CD and pricing tables and to try to devise a work-around to minimize any
 3 burden on Mitchell. Eagle Eyes now understands that their good intentions have
 4 back-fired and that Mitchell does not “want” to have to do any “work” to comply
 5 with this Subpoena. *See* Rosen Decl. at ¶¶ 57-59. Mitchell’s delay and posturing
 6 for the past five months has imposed an undue burden on Eagle Eyes.

7 The time for production long ago elapsed and it is clear that Mitchell will not
 8 honor its obligations pursuant to Rule 45 without a Court order. As such, the Court
 9 should **grant** the Motion and Order Mitchell to produce the Pricing Data.

10 **V. CONCLUSION**

11 Based on the foregoing, this Court should **GRANT** Eagle Eyes’ Motion to
 12 Compel and Order Mitchell to, within fourteen (14) days of the date of this Order,
 13 either: (1) export and produce in usable data all pricing data for autolights between
 14 January 1, 2001 and December 31, 2010, **OR** (2) create and run all necessary
 15 queries to retrieve responsive data from the Estimate’s Database and produce that to
 16 Eagle Eyes for the period of January 1, 2001 and December 31, 2010, whichever
 17 the Court deems appropriate.

18 Dated: February 25, 2013

19 By: /s/ Diana Iketani Iorlano

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